No. 86-1727

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1986

JOHN R. CONNOR,

Plaintiff-Appellant,

vs.

R.G. SACKS, M.D., T.V. INGLESBY, M.D., J.A. BELLADONNA, M.D., N.L. MURRAY, M.D., C.J. WITTMANN, JR., M.D. and OVERLOOK HOSPITAL,

Defendants-Appellees.

On Appeal from the Supreme Court of New Jersey

MOTION TO DISMISS PLAINTIFF'S APPEAL

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QUESTION PRESENTED

Whether plaintiff may appeal to the United States Supreme Court where jurisdiction is premised upon 28 U.S.C. § 1257(2); 28 U.S.C. § 1257(3) and 28 U.S.C. § 2103 where the order from which he appeals is neither final nor from the highest court of the state nor presents any constitutional question.

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STATEMENT OF JURISDICTION

This is a motion to dismiss appeal brought pursuant to Rule 16 subparts (a) and (b) of the Rules of the Supreme Court of the United States. Rule 16 provides in pertinent part:

> 1. Within 30 days after receipt of the jurisdictional statement . . .the appellee may file a motion to dismiss. . . .
>
> (a) The Court will receive a motion to dismiss an appeal on the ground that the appeal is not within this Court's jurisdiction, or because not taken in conformity with statute or with these Rules.

Jurisdiction is premised upon 28 U.S.C. § 1257(2); 28 U.S.C. § 1257(3) and 28 U.S.C § 2103. These sections require that the order being appealed be both final and from the highest court of the state. The order plaintiff appeals from is neither. This Court has no jurisdiction over this appeal.

Moreover, subsection (b) of Rule 16 provides that:

> The Court will receive a motion to dismiss an appeal from a state court on the ground that it did not present a substantial federal question; or that the federal question sought to be reviewed was not timely or properly raised and was not expressly passed on; or that the judgment rests on an adequate non-federal basis.

The New Jersey Appellate Division in its decision filed May 29, 1986 explicitly refused to address the "constitutional" issue. Instead, it gave the plaintiff the opportunity to establish standing by substituting an estate administrator as party plaintiff or appointing plaintiff, Mr. Connor, as administrator *ad prosequendum*.

Further, the constitutional question plaintiff seeks to raise was not then nor is now properly raised because his willful non-compliance with a state statute which would have given him

standing to bring the wrongful death action as executor under a will, does not give rise to a constitutional question.

Defendant-appellee Overlook Hospital, therefore, brings this motion to dismiss plaintiff-appellant's appeal.

STATUTES AND COURT RULES INVOLVED

N.J.S.A. 2A:31-2. Persons Entitled to Sue or Make Claim provides:

> Every action commenced under this chapter shall be brought in the name of an administrator ad prosequendum of the decedent for whose death damages are sought, except where decedent dies testate and his will is probated, in which event the executor named in the will and qualifying, or the administrator with the will annexed, as the case may be, shall bring the action.

N.J.S.A. 3B:10-23. Duty of Personal Representative to Settle and Distribute Estate provides:

> A personal representative is under a duty to settle and distribute the estate of the decedent in accordance with the terms of any probated and effected will and applicable law, and as expeditiously and efficiently as is consistent with the best interests of the estate. He shall use the authority conferred upon him by law, the terms of the will, if any, and any order in proceedings to which he is a party for the best interests of successors to the estate.

N.J.S.A. 3B:3-29. Order to Compel Production of Purported Will provides:

> The Superior Court shall have jurisdiction to compel discovery as to the existence or whereabouts of any paper purporting to be a will of any decedent who died a resident of the county, which has not been offered for probate, and to require the paper to be lodged with the surrogate of the county for probate.

New Jersey Court Rule 2:2-1. Appeals to the Supreme Court from Final Judgments provides:

> (a) As of Right. Appeals may be taken to the Supreme Court from final judgments as of right: (1) in cases determined by the Appellate Division involving a substantial question arising under the Constitution of the United States or this State; (2) in cases where, and with regard to those issues as to which, there is a dissent in the Appellate Division; (3) directly from the trial courts in cases where the death penalty has been imposed and in post-conviction proceedings in such cases; (4) in such cases as are provided by law.
>
> (b) On Certification. Appeals may be taken to the Supreme Court from final judgments on certification to the Appellate Division pursuant to R. 2:12.

New Jersey Court Rule 2:2-2. Appeals to the Supreme Court from Interlocutory Orders provides:

> Appeals may be taken to the Supreme Court

by its leave from interlocutory orders:

(a) Of trial courts in cases where the death penalty has been imposed.

(b) Of the Appellate Division when necessary to prevent irreparable injury;

(c) On certification by the Supreme Court to the Appellate Division pursuant to R. 2:12-1.

New Jersey Court Rule 2:2-3. Appeals to the Appellate Division from Final Judgments, Decisions, Actions and from Rules; Tax Court provides:

(a) As of Right. Except as otherwise provided by R. 2:2-1(a)(3) (final judgments appealable directly to the Supreme Court), appeals may be taken to the Appellate Division as of right

(1) from final judgments of the Superior Court trial divisions, or the judges thereof sitting as statutory agents; the Tax Court; and in summary contempt proceedings in all trial courts except municipal courts;

(2) to review final decisions or actions of any state administrative agency or officer, and to review the validity of any rule promulgated by such agency or officer excepting matters prescribed by R. 8:2 (tax matters) and matters governed by R. 4:74-8 (Wage Collection Section appeals), except that review pursuant to this subparagraph shall not be maintainable so long as there is available a right of review before any administrative agency or

officer, unless the interest of justice requires otherwise;

(3) in such cases as are provided by law.

Final judgments of a court, for appeal purposes, shall also include those referred to by R. 4:42-2 (certification of interlocutory order), R. 5:8-6 (final custody determination in bifurcated matrimonial action), R. 5:10-6 (order on preliminary hearing in adoption action).

(b) By Leave. On application made pursuant to R. 2:5-6, appeals may be taken to the Appellate Division by leave granted, in extraordinary cases and in the interest of justice, from final judgments of a court of limited jurisdiction or from actions or decisions of an administrative agency or officer if the matter is appealable or reviewable as of right in a trial division of the Superior Court, as where the jurisdiction of the court, agency or officer is questioned on substantial grounds.

New Jersey Court Rule 2:2-4. Appeals to the Appellate Division from Interlocutory Orders, Decisions or Actions provides:

Except as otherwise provided by R. 3:28, the Appellate Division may grant leave to appeal, in the interest of justice, from an interlocutory order of a court or of a judge sitting as a statutory agent, or from an interlocutory decision or action of a state administrative agency or officer, if the final judgment, decision or action thereof is appealable as of right pursuant to R. 2:2-3(a), but no such

> appeal shall be allowed in cases referred to in R. 2:2-2(a).

New Jersey Court Rule 2:2-5. Consequences of Certain Appellate Division Judgments provides:

> A judgment of the Appellate Division on an appeal to it from an interlocutory order, decision or action shall be deemed to be interlocutory and not appealable to the Supreme Court as a final judgment, unless the judgment of the Appellate Division is dispositive of the action.

New Jersey Court Rule 4:46-2. Motion and Proceedings Thereon provides in pertinent part:

> . . . A summary judgment or order, interlocutory in character may be rendered on any issue in the action (including the issue of liability) although there is a genuine factual dispute as to any other issue (including any issue as to the amount of damages). Subject to the provisions of R. 4:42-2 (judgment upon multiple claims), a summary judgment final in character may be rendered in respect of any portion of the damages claimed.

New Jersey Court Rule 4:42-2. Judgment Upon Multiple Claims provides in pertinent part:

> . . . any order or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims.

STATEMENT OF THE CASE

Mary A. Connor, the mother of the plaintiff-appellant John R. Connor (hereinafter plaintiff), died in Overlook Hospital, Summit, New Jersey on November 24, 1977.

Although the history of the attempts to settle the estate of the late Mary A. Connor are complex, there are relatively few facts which the Court need consider in deciding this motion to dismiss the plaintiff's appeal.

Plaintiff John R. Connor was named executor in a will executed by the late Mrs. Connor. Although Mr. Connor was in possession of the late Mrs. Connor's will, he declined to offer the will for probate, as mandated by a New Jersey statute.

On application of a creditor, the Chancery Division, Essex County, New Jersey entered judgment on May 25, 1978, granting letters of administration to attorney George Warren (Plaintiff's Appendix O at 28a-92a).

When it became apparent to the court that Mr. Connor was in possession of what appeared to be a valid will, further proceedings were undertaken which resulted in a judgment entered December 3, 1979, appointing Mr. Warren as administrator with the will annexed and reciting that this appointment was made notwithstanding the designation of Mr. Connor as executor in the will (Defendant's Appendix A, *infra,* 1a).

Mr. Connor, during the time that Mr. Warren was acting as administrator of the estate, filed a complaint for wrongful death, in the purported capacity of, "beneficiary and executor-designate of the Estate of Mary A. Connor." (Defendant's Appendix B, 4a).

By motion originally returnable May 30, 1980, defendant-

appellee Overlook Hospital (hereinafter defendant), moved for a dismissal of the complaint on the ground that the applicable statute N.J.S.A. 2A:31-2 provided that only an executor, administrator *ad prosequendum*, or executor with a will annexed, had standing to file a suit for wrongful death (Defendant's Appendix C, 16a). By order dated July 31, 1980, however, all proceedings in the death action were stayed (Defendant's Appendix D, 21a).

The motion was eventually denied without prejudice by the court on January 23, 1981, pending the resolution of various appeals filed by Mr. Connor in the probate proceedings. The motion to dismiss was refiled by defendant physicians and ultimately, on February 10, 1984, the court granted the motion and entered an order dismissing Mr. Connor's wrongful death complaint for lack of standing as to all defendants (Plaintiff's Appendix E at 9a-10a). An appeal followed.

The New Jersey Appellate Division reversed by opinion of May 29, 1986 (Plaintiff's Appendix D at 4a-8a). It remanded the case providing the plaintiff with the opportunity to establish standing within thirty days. Plaintiff refused to avail himself of this opportunity after the Appellate Division denied his motion for reconsideration (Plaintiff's Appendix C at 3a). He then filed an appeal to the New Jersey Supreme Court arguing the constitutional invalidity of N.J.S.A. 2A:31-2 (Defendant's Appendix E, 23a). The New Jersey Supreme Court dismissed the appeal pursuant to defendant physicians' motion brought on the grounds that the appeal was improper and that the plaintiff should have petitioned for certification (Plaintiff's Appendix B at 2a). The New Jersey Supreme Court denied appellant's subsequent motion for reconsideration by order filed January 26, 1987 (Plaintiff's Appendix A at 1a).

Thus the New Jersey Supreme Court never considered any

substantive issue raised by plaintiff. While plaintiff contends he is appealing an order of the New Jersey Supreme Court, that "order" is nothing more than the court's acknowledgment that it did not have jurisdiction over the appeal as plaintiff had no appeal as of right but should have filed for certification.

Long after the time for plaintiff to comply with the Appellate Division's order expired, the defendant Overlook Hospital brought a motion for summary judgment on two grounds. The first was plaintiff's failure to comply with the Appellate Division's order and the second was that the plaintiff failed to make a *prima facie* case of malpractice against the hospital (Defendant's Appendix F, 26a). Judge Sachar of the Superior Court of New Jersey, Law Division, Union County, granted the motion and entered the order dismissing the plaintiff's complaint as to Overlook Hospital *only*, on September 12, 1986 (Plaintiff's Appendix J at 18a-19a). The case continued against the defendant physicians.

Plaintiff appealed Judge Sachar's order to the Appellate Division. The appeal was dismissed by order entered March 5, 1987 on the grounds that the appeal was interlocutory (Defendant's Appendix G, 36a). That is where the case ended as to defendant Overlook Hospital.[1]

Plaintiff is essentially appealing the Appellate Division's interlocutory order entered May 29, 1986, in which the court specifically refused to address the constitutional challenge raised by plaintiff.

---

1. In view of the complexity of the procedural history of this case, it is hoped that the graphic representation included in Appendix H (38a) will clarify the two courses of appeals.

ARGUMENT

I.

THIS COURT DOES NOT HAVE JURISDICTION OVER THIS APPEAL BECAUSE THE ORDER FROM WHICH PLAINTIFF APPEALS IS NEITHER "FINAL" NOR IS IT FROM THE HIGHEST COURT OF THE STATE OF NEW JERSEY.

Appellant invokes the jurisdiction of this Court under 28 U.S.C. § 1257(2) which provides that:

> Final judgments or decrees rendered by the highest Court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (2) By appeal, where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

The order from which the plaintiff ostensibly appeals is the New Jersey Supreme Court's order entered January 1, 1987 denying reconsideration of its order of December 16, 1986 dismissing the plaintiff's appeal of the Appellate Division's order filed July 1, 1986 denying reconsideration of its order filed May 29, 1986. In essence, the plaintiff is appealing the Appellate Division's interlocutory order of May 29, 1986. The Appellate Division's order of May 29, 1986 reversed the trial court's dismissal of plaintiff's wrongful death action for lack of standing. Instead, the court gave the plaintiff 30 days to establish his standing to bring this wrongful death action by requesting that the current administrator of the estate, Mr. Phillips, substitute as party

plaintiff and to maintain this wrongful death action and to provide a further opportunity if Phillips refused, to join Phillips as a party defendant in order to compel his substitution as plaintiff or, to appoint the plaintiff himself as administrator *ad prosequendum*.

Plaintiff refused to comply with the Appellate Division's order granting him this more-than-generous opportunity to establish his standing to bring the wrongful death action well after the time period for plaintiff to establish his standing expired.

Instead, on September 12, 1986 the plaintiff brought a motion for stay of the judgment (an erroneous designation as it was an order not a judgment) of May 29, 1986 on the grounds he was appealing this decision to the New Jersey Supreme Court. The motion was granted on October 10, 1986 (Plaintiff's Appendix N at 26a). Plaintiff was actually appealing a decision which was favorable to him but with which he didn't care to comply. In October of 1986, Shanley and Fisher, counsel for Dr. Sachs, Inglesby, Belladonna, Murray and Wittmann, filed a motion in the New Jersey Supreme Court to dismiss plaintiff's appeal to the Supreme Court. Plaintiff filed opposition to the motion on October 20, 1986. On December 16, 1986 the New Jersey Supreme Court granted defendant's motion to dismiss the plaintiff's appeal to the New Jersey Supreme Court (Plaintiff's Appendix A at 1a). Neither New Jersey Court Rule 2:2-1 concerning appeals from final judgments nor Rule 2:2-2 regarding appeals to the Supreme Court from interlocutory orders provide for the court to consider the plaintiff's appeal as it was presented. New Jersey procedure provides that "A judgment of the Appellate Division on an appeal to it from an interlocutory order shall be deemed to be interlocutory and not appealable to the Supreme Court as a final judgment, unless the judgment of the Appellate Division is dispositive of the action." N.J. Court Rules 2:2-5.

On January 21, 1987 the New Jersey Supreme Court denied

plaintiff's motion for reconsideration of their order of December 16, 1986 dismissing the plaintiff's appeal (Plaintiff's Appendix B at 2a). The New Jersey Supreme Court's dismissal of plaintiff's motion for reconsideration and their dismissal of plaintiff's appeal was based upon procedural grounds. The appeal was not properly before the New Jersey Supreme Court, and was dismissed on that basis. It is the New Jersey Supreme Court's refusal to hear plaintiff's appeal of the Appellate Division's interlocutory order which he presently appeals to the United States Supreme Court (Defendant's Appendix H, 38a). Simultaneously, defendant Overlook Hospital *only* brought a motion to dismiss plaintiff's complaint for plaintiff's failure to comply with the Appellate Division's order (Defendant's Appendix F, 26a). Judge Sachar of the Superior Court, Law Division, granted the motion and entered the order dismissing plaintiff's complaint as to defendant Overlook Hospital only, on September 12, 1986 (Plaintiff's Appendix J at 18a-19a). New Jersey law is clear that where the complaint is dismissed as to one defendant only, the plaintiff may continue as to the other defendants and the order of dismissal is interlocutory only. N.J. Court Rules 4:46-2 and 4:42-2; *Ford v. Weisman,* 188 N.J. Super. 614 (App. Div. 1983).

Plaintiff appealed Judge Sachar's order. This notice of appeal was dismissed on the grounds that it was taken from an interlocutory order (Defendant's Appendix G, 36a). Under New Jersey procedure, appeals to the Appellate Division may only be taken from final judgments. N.J. Court Rule 2:2-3. To appeal from interlocutory orders, New Jersey practice provides that a party move for leave to appeal to the Appellate Division. Pursuant to N.J. Court Rule 2:2-4.

In *Henderson v. Morristown Memorial Hospital,* 198 N.J. Super. 418, 426, 427 (App. Div. 1985), the court held that judgments are not final which leave issues for determination and do not dispose of all issues to all parties. Further, judgments which

are interlocutory are not appealable as a matter of right. *Citing* R. 2:2-3(a)(1). Instead, application for leave to appeal must be made. Where such ill-advised appeals are taken in the first instance the respondents have a responsibility to the appellate court to file a timely motion to dismiss the appeal. This defendant did in filing the motion to dismiss plaintiff's appeal of Judge Sachar's order.

The case against defendant Overlook Hospital ended with Judge Furman's order entered March 5, 1987 dismissing plaintiff's appeal (Defendant's Appendix H, 38a).

II.

THIS CASE PRESENTS NO CONSTITUTIONAL ISSUE. THE APPELLATE DIVISION IN ITS DECISION FILED MAY 29, 1986 EXPLICITLY REFUSED TO ADDRESS THE "CONSTITUTIONAL" ISSUE PRESENTED BY PLAINTIFF.

As set forth, *infra,* the plaintiff appealed from the dismissal on motion of his wrongful death action and from the denial of his cross-motion to declare N.J.S.A. 2A:31-2 unconstitutional or alternatively, to substitute Lucas E. Phillips, Jr., administrator of his mother's estate, as party plaintiff.

The Appellate Division by order of May 29, 1986 reversed the dismissal and remanded the case to the trial court explicitly refusing to address the constitutional issue raised by the plaintiff's cross-motion. The court said:

> We need not reach the constitutional issue raised by plaintiff that N.J.S.A. 2A:31-2 violates equal protection of the law because of its differing standards for who may bring claims on behalf of testate and intestate estates . . . .

(Plaintiff's Appendix D at 6a).

Instead the court reversed the dismissal to:

> [P]rovide an opportunity to plaintiff, within 30 days of the date of our remand, to request Phillips to substitute as party plaintiff and to maintain the wrongful death action and to provide a further opportunity if Phillips refuses, within 30 days thereafter, to join Phillips as a party defendant in order to compel his substitution as plaintiff or, alternatively, to appoint the present plaintiff as administrator *ad prosequendum*.

(Plaintiff's Appendix D at 7a).

Pursuant to Rule 16(b), a ground for dismissal of the appeal is that "it does not present a substantial federal question; or that the federal question sought to be reviewed was not timely or properly raised and was not expressly passed on; or that the judgment rests on an adequate nonfederal basis." In the case at bar it is clear that the question of the constitutionality of N.J.S.A. 2A:31-2 was not properly raised by the plaintiff and was not expressly passed on by the Appellate Division.

III.

THIS CASE PRESENTS NO CONSTITUTIONAL ISSUE. PLAINTIFF'S INABILITY TO PROSECUTE THIS ACTION RESULTS FROM HIS OWN REFUSAL TO ABIDE BY THE LAW.

Mr. Connor was named executor of his mother's will. As executor, he was under an obligation imposed by N.J.S.A. 3A:2A-5 (now 3B:10-23) to act in the best interests of the estate

and settle the estate expeditiously and efficiently. He was further under an obligation imposed by N.J.S.A. 3A:3-23 (now 3B:3-29) to produce for probate any will of which he was aware.

Because Mr. Connor declined to abide by these statutes, the Chancery Division in Essex County, New Jersey on May 25, 1978, appointed an administrator for the estate. This appointment was appealed to the Appellate Division, and the Chancery Division's action was affirmed in the court's opinion of September 24, 1979.

When, through the efforts of the administrator, a will was ultimately produced, the Chancery Division entered a further order appointing the administrator as an administrator with the will annexed and further finding that Mr. Connor, by virtue of his prior actions, was unfit to serve as executor. Attempts on the part of plaintiff to have this order reversed on appeal have proven unavailing.

While the issue of plaintiff's right to delay admitting the will into probate was being litigated, the statute of limitations for wrongful death expired. Plaintiff does not dispute that, when the statute ran, he was not the duly qualified executor of the estate. He further concedes that there was at the time an administrator *c.t.a.* in existence and that this person was vested with the right to file an action for wrongful death. Nowhere in plaintiff's Jurisdictional Statement is it argued that he was somehow prevented from qualifying as executor. Indeed, it appears from the orders of the Chancery Division that plaintiff was given several opportunities over a period of years to do that which he was obligated to do by statute. Furthermore, it is beyond dispute that, had plaintiff complied with the law, he would have qualified as executor and would have been in a position to file a wrongful death action if he chose.

Thus, it is not N.J.S.A. 2A:31-2 which has prevented plaintiff

from prosecuting the action, it is plaintiff's own willful failure to comply with his legal obligations which has resulted in the present situation.

An analogous issue was addressed by the Supreme Court in *Corbitt v. New Jersey,* 439 U.S. 212, 99 S. Ct. 492, 58 L. Ed. 2d 466 (1978). There, a defendant was charged with first degree murder in New Jersey. The statute then in force provided that while pleas of guilty to first degree murder were not acceptable, a plea of *non-vult* or *nolo contendere* could be accepted. If plaintiff were convicted of first degree murder, the statute provided for mandatory life sentence. If plaintiff were to plead, the court was vested with discretion to sentence plaintiff either to life or to the penalty for second degree murder. Defendant chose to go to trial, was convicted and sentenced to life imprisonment. On appeal, defendant argued that the statute providing for a lesser penalty in the event of a plea was violative of the Equal Protection Clause of the Fourteenth Amendment, since it was designed to penalize persons who chose to exercise their right to a trial. In essence, the defendant's position was that, had he known in advance what the outcome of his trial would have been, he would have chosen to plead and argue for the lesser sentence.

Holding New Jersey's statutory scheme constitutional, Justice White, for the court, remarked that equal protection does not free those who have made a bad assessment of risks or a bad choice from the consequences of their decision. 439 U.S. at 226.

This reasoning applies with equal force to the contention presented by plaintiff in this case. Certainly, there has been no showing of "invidious discrimination" such as is proscribed by the Fourteenth Amendment and no showing that there exists here anything more than a mere inequality or difference in treatment, not constitutionally prohibited, *Dandridge v. Williams,* 397 U.S. 471, 90 S. Ct. 1153, 25 L. Ed. 2d 491 (1970). Absent any showing

of such invidious discrimination, the legislative structure of the wrongful death statute must be upheld, *Morey v. Doud*, 354 U.S. 457, 77 S. Ct. 1344, 1 L. Ed. 2d 1485 (1957).

Plaintiff here, like the defendant in *Corbitt*, has made what hindsight has shown to be a bad decision. It is not the function of the Constitution to free citizens from the consequences of their willful disregard of the law, and plaintiff herein is entitled to no relief.

CONCLUSION

For the reasons set forth, this Court does not have jurisdiction of this appeal and defendant's motion to dismiss should therefore be granted.

Respectfully submitted,

JAY SCOTT MacNEILL
Attorney for Appellee
Overlook Hospital

ROCHELLE GIZINSKI
On the Brief

APPENDIX A—JUDGMENT OF DECEMBER 3, 1979 GRANTING LETTERS TO GEORGE WARREN

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A PROFESSIONAL CORPORATION
744 BROAD STREET
NEWARK, NEW JERSEY 07102
(201) 621-8800
Plaintiff Pro se

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION — ESSEX COUNTY
DOCKET NO. P-392-77

Civil Action

In the Matter of the Estate

of

MARY A. CONNOR, Deceased

JUDGMENT GRANTING PROBATE AND LETTER OF ADMINISTRATION WITH THE WILL ANNEXED

This matter coming before the Court on November 14, 1979, the return date of an Order to Show Cause of George Warren, Esq., Administrator of the Estate of Mary A. Connor for probate of the Will of Mary A. Connor and in the presence of the Administrator pro se (George Warren, Esq. appearing) and several creditors of Mary A. Connor: namely, Hannoch, Weisman, Stern & Besser, P.A., plaintiff pro se (Irwin P. Burzynski, Esq. appearing; Milton, Keane & Brady pro se and attorneys for Fred Blackwell (John B. O'Neill, Esq. appearing); Fred Blackwell, Esq. appearing; and the Beneficiaries of the Estate of Mary Ellen Flynn (John Anthony Lombardi, Esq. appearing).

Appendix A

And the Court having read the Petition, Answers, Claims, Certification and Memorandum of Law in connection herewith including the transcript of proceedings in this action of September 26, 1979,

And the Court having inquired into the circumstances and taken proof, and being satisfied as to the genuineness of the Will, the validity of its execution and the competency of the testatrix, and it further appearing that testatrix died on November 24, 1977, and that no caveat has been filed against the probate of said Will, and for good cause shown,

It is on this 3 day of December, 1979,

ORDERED and ADJUDGED that the instrument offered for probate in this matter be and it is hereby established as the last will of Mary A. Connor, deceased, and it be and hereby is admitted to probate; and it is further

ORDERED that due to the conduct of John R. Connor in this action as set forth on the record herein, and notwithstanding the designation of the testatrix of John R. Connor as Executor, the Court will appoint someone else to act as fiduciary for the Estate of Mary A. Connor; and it is further

ORDERED that upon notice to all parties in interest, letters of Administration with the will annexed upon the Estate of Mary A. Connor be granted to Lucas E. Phillips, Jr., Esq. of 18 Beaver Street, Newark, New Jersey 07102, telephone number (201) 624-0600, upon his giving bond to the Superior Court of New Jersey in the sum of $25,000, conditioned according to law, and with sureties to be approved by this Court; and it is further

ORDERED that George Warren, Esq. may hereby withdraw

Appendix A

as Administrator of the Estate of Mary A. Connor and that he is to present his final account, together with any requests for fees and disbursements, to the Court on December 7, 1979, at 9:00 in the forenoon, whereupon he may be discharged as Administrator of the Estate of Mary A. Connor.

s/ Geoffrey Gaulkin
Geoffrey Gaulkin, J. S. C.

APPENDIX B—PLAINTIFF'S WRONGFUL DEATH COMPLAINT FILED NOVEMBER 21, 1979

John R. Connor, *Pro se*
380 Wyoming Avenue
Millburn, New Jersey 07041
(201) 762-5587

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION : UNION COUNTY
DOCKET NO. MM

Civil Action

In the matter of

JOHN R. CONNOR, Beneficiary and Executor-designate of the Estate of Mary A. Connor and for the ADMINISTRATOR of the Estate of Mary A. Connor, for the benefit of Thomas B. Connor, Sr., Thomas B. Connor, Jr., John R. Connor, Robert L. Connor and Carol Moken,

Plaintiffs,

-vs-

R. G. SACHS, M.D., T. V. INGLESBY, M.D., J. A. BELLADONNA, M.D., N.L. MURRAY, M.D., C. J. WITTMAN, JR., M.D. and OVERLOOK HOSPITAL,

Defendants.

COMPLAINT: WRONGFUL DEATH (N.J.S.A. 2A:31 *et seq.*)
AND JURY DEMAND

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The Plaintiff, John R. Connor, residing at 380 Wyoming Avenue, Millburn, New Jersey, complaining of the defendants, says that:

FIRST COUNT

1. On or about August 16, 1977 decedent Mary A. Connor developed symptoms of atrial fibrillation and conjestive heart failure for which she was admitted, by N. L. Murray, M.D., to Overlook Hospital, Summit, New Jersey on September 13, 1977, and came under the care of the defendant, R. G. SACHS, M.D.

2. The defendant, R. G. SACHS, M.D., on, before and after September 13, 1977 was a practicing physician (cardiologist) holding himself out to the public and to the decedent as being skilled, careful and diligent in the practice of his profession.

3. The defendant, R. G. SACHS, M.D., attended and cared for decedent Mary A. Connor on or about September 13, 1977 and during the time of her succeeding periods of hospitalization at Overlook Hospital, to wit: September 13 - October 5, 1977; October 29 - November 11, 1977; and November 21 - 24, 1977.

4. After decedent Mary A. Connor was discharged from Overlook Hospital on October 5, 1977 and November 11, 1977, and while she was at home, the defendant, R. G. SACHS, M.D., continued to care for and to treat decedent at his office and at decedent's home by telephone. During this time decedent Mary A. Connor and her son, John R. Connor, on her behalf, made numerous complaints to the defendant of nausea, leg pain, gastrointestinal disturbance and abdominal pain. Said complaints were made over a period of approximately six weeks until November 20, 1977.

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5. The defendant, R. G. SACHS, M.D., undertook to treat and care for decedent Mary A. Connor beginning on or about September 13, 1977 and thereafter until November 24, 1977. It was the duty of the defendant, R. G. SACHS, M.D., to exercise such reasonable skill and care as is usually required by physicians (cardiologists) under similar circumstances and in similar places in making all diagnoses, examinations, operations, tests and treatments preoperatively and postoperatively and not to abandon or neglect the patient in any respect.

6. Notwithstanding the duty imposed on the defendant, R. G. SACHS, M.D., as aforesaid, the defendant, well knowing his duty to the decedent, did wilfully and negligently fail to exercise reasonable skill and care as is usually exercised by physicians (cardiologists) in similar circumstances and in similar places in the following particulars:

a. The defendant, R. G. SACHS, M.D., wilfully and negligently failed to exercise reasonable skill and care when he failed to properly treat decedent's numerous complaints of nausea, leg pain, gastrointestinal disturbance and abdominal pain and wilfully concealed from decedent her medical condition of "aortic stenosis."

b. The defendant, R. G. SACHS, M.D., failed to exercise reasonable skill and care when he administered the drug "Norpace" to decedent Mary A. Connor on September 16, 1977, which administration nearly caused the death of Mary A. Connor on September 17, 1977.

c. The defendant, R. G. SACHS, M.D., wilfully failed to inform the decedent or her family of the true and correct results of decedent's left-heart catheterization on September 30, 1977.

Appendix B

d. The defendant, R. G. SACHS, M.D., negligently failed to test decedent for "aortic stenosis" at an earlier period of time, when decedent's chances of surviving such surgery would have been greater.

e. The defendant, R. G. SACHS, M.D., failed to exercise reasonable skill and care when he wilfully and negligently prescribed the drug "Digoxin" to decedent Mary A. Connor during the months of October and November, 1977, after Mary A. Connor had received a pacemaker.

f. The defendant, R. G. SACHS, M.D., failed to exercise reasonable skill and care when he negligently failed to diagnose and treat decedent Mary A. Connor for pancreatitis at Overlook Hospital in the period from November 21 - 23, 1977.

g. The defendant, R. G. SACHS, M.D., failed to exercise reasonable skill and care in negligently failing to diagnose the drug "Demerol" as the cause for the drop in decedent's blood pressure on the morning of November 23, 1977.

h. The defendant, R. G. SACHS, M.D., failed to exercise reasonable skill and care on November 23, 1977 when he decided to operate on Mary A. Connor without sufficient cause and without correctly diagnosing the cause of decedent's abdominal pain.

i. The defendant, R. G. SACHS, M.D., was otherwise wilfully negligent in failing to secure the "informed consent" of decedent's husband, Thomas B. Connor, Sr., for the exploratory surgery on November 23, 1977.

j. The defendant, R. G. SACHS, M.D., was otherwise

negligent and failed to exercise reasonable skill and care in the treatment of decedent Mary A. Connor and was otherwise negligent in failing to properly treat decedent postoperatively.

7. As a result of the grossly negligent and wrongful and wilfully negligent acts on the part of defendant, R. G. SACHS, M.D., as aforesaid, Mary A. Connor died in Overlook Hospital on November 24, 1977.

WHEREFORE, Plaintiff demands judgment on this count against the defendant, R. G. SACHS, M.D., for compensatory and punitive damages and costs.

SECOND COUNT

1. Plaintiff repeats the allegations of the First Count and makes them Paragraph #1 of this count.

2. The defendant, T. V. INGLESBY, M.D., on, before and after September 13, 1977 was a practicing physician (cardiologist) holding himself out to the public and to the decedent Mary A. Connor as being skilled, careful and diligent in the practice of his profession.

3. The defendant, T. V. INGLESBY, M.D., undertook to treat and care for the decedent Mary A. Connor at various times during her hospitalizations at Overlook Hospital. It was the duty of the defendant, T. V. INGLESBY, M.D., to exercise such reasonable skill and care as is usually required by physicians (cardiologists) under similar circumstances and in similar places in making all diagnoses, examinations, operations, tests and treatments preoperatively and postoperatively and not to abandon or neglect the patient in any respect.

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4. Notwithstanding the duty imposed on the defendant, T. V. INGLESBY, M.D., as aforesaid, and the defendant well knowing his duty to the decedent, he did, negligently fail to exercise reasonable skill and care as is usually exercised by physicians (cardiologists) in similar circumstances and in similar places in the following particulars:

a. The defendant, T. V. INGLESBY, M.D., failed to exercise reasonable skill and care when he negligently failed to inform decedent Mary A. Connor, or her family of the true and correct results of her left-heart catheterization on September 30, 1977.

b. The defendant, T. V. INGLESBY, M.D., failed to exercise reasonable skill and care when he negligently failed to resolve decedent's medication problems subsequent to his agreement with plaintiff to do so on October 29, 1977.

c. The defendant, T. V. INGLESBY, M.D., was otherwise negligent and he failed to exercise reasonable skill and care in the treatment of Mary A. Connor.

5. As a result of the negligent acts on the part of the defendant, T. V. INGLESBY, M.D., as aforesaid, Mary A. Connor died in Overlook Hospital on November 24, 1977.

WHEREFORE, Plaintiff demands judgment on this count against the defendant, T. V. INGLESBY, M.D., for compensatory damages and costs.

THIRD COUNT

1. Plaintiff repeats the allegations of the First and Second Counts and makes them Paragraph #1 of this count.

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2. The defendant, J. A. BELLADONNA, M.D., was and is a physician (gastroenterologist) holding himself out to the public and the decedent as being skilled, careful and diligent in the practice of his profession.

3. After decedent Mary A. Connor was admitted to Overlook Hospital on November 21, 1977, the defendant, J. A. BELLADONNA, M.D., examined decedent Mary A. Connor to discover the cause of her abdominal pain.

4. It was the duty of the defendant, J. A. BELLADONNA, M.D., to exercise such reasonable skill and care as is usually required by physicians (gastroenterologists) under similar circumstances and in similar places, in making all diagnoses, examinations, operations, tests and treatments preoperatively and postoperatively and not to abandon or neglect the patient in any respect.

5. Notwithstanding the duty imposed upon the defendant, J. A. BELLADONNA, M.D., as aforesaid, and the defendant well knowing his duty to the decedent, he did, negligently fail to exercise reasonable skill and care as is usually exercised by physicians (gastroenterologists) in similar circumstances and in similar places in the following particulars:

a. The defendant, J. A. BELLADONNA, M.D., failed to test for and diagnose pancreatitis as the cause of decedent Mary A. Connor's abdominal pain in the period from November 21 - 24, 1977 and advised exploratory surgery without sufficient cause.

b. The defendant, J. A. BELLADONNA, M.D., was otherwise negligent and failed to exercise reasonable skill and care in the treatment of decedent Mary A. Connor.

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6. As a result of the negligent and wrongful acts on the part of the defendant, J. A. BELLADONNA, M.D., as aforesaid, Mary A. Connor died in Overlook Hospital on November 24, 1977.

WHEREFORE, Plaintiff demands judgment against the defendant, J. A. BELLADONNA, M.D., for compensatory and punitive damages and costs.

FOURTH COUNT

1. Plaintiff repeats the allegations of the First, Second and Third Counts and makes them Paragraph #1 of this count.

2. The defendant, N. L. MURRAY, M.D., was, is and for a number of years prior to September 13, 1977 a physician holding himself out to the public and to the decedent as being skilled, careful and diligent in the practice of his profession.

3. The defendant, N. L. MURRAY, M.D., was, for a number of years prior to 1977, decedent Mary A. Connor's personal physician, being intimately familiar with her medical history, condition and problems. During this time and up until September 13, 1977, the defendant, N. L. MURRAY, M.D., undertook to treat and care for decedent, particularly in the period from August 16, 1977 to September 13, 1977.

4. It was the duty of the defendant, N. L. MURRAY, M.D., to exercise such reasonable skill and care as is usually exercised and required by physicians under similar circumstances and in similar places in making all diagnoses, examinations, operations, tests and treatments preoperatively and postoperatively and not to abandon or neglect the patient in any respect.

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5. Notwithstanding the duty imposed on the defendant, N. L. MURRAY, M.D., as aforesaid, and the defendant well knowing his duty to the decedent, he did, negligently fail to exercise reasonable skill and care as is usually exercised by physicians in similar circumstances and in similar places in the following particulars:

a. The defendant, N. L. MURRAY, M.D., negligently failed to exercise reasonable skill and care when he abandoned his patient, Mary A. Connor, after September 13, 1977.

6. As a result of the negligent and wrongful acts on the part of the defendant, N. L. MURRAY, M.D., as aforesaid, Mary A. Connor died in Overlook Hospital on November 24, 1977.

WHEREFORE, Plaintiff demands judgment on this count against the defendant, N. L. MURRAY, M.D., for compensatory damages and costs.

FIFTH COUNT

1. Plaintiff repeats the allegations of the First, Second, Third and Fourth Counts and makes them Paragraph #1 of this count.

2. The defendant, C. J. WITTMAN, JR., M.D., was, is and for a number of years prior to November 23, 1977 a physician and surgeon holding himself out to the public as being skilled, careful and diligent in the practice of his profession.

3. Notwithstanding the duty imposed upon the defendant, C. J. WITTMAN, JR., M.D., as aforesaid, and the defendant well knowing his duty to decedent, Mary A. Connor, he did negligently and wilfully fail to exercise reasonable skill and care

as is usually exercised by physicians and surgeons in similar circumstances and in similar places in the following manner:

a. The defendant, C. J. WITTMAN, JR., M.D., performed an exploratory laparotomy on decedent Mary A. Connor on November 23, 1977, without sufficient cause, and re-opened said laparotomy, without sufficient cause, attempting subsequently to conceal said reopening from decedent's family.

4. As a result of the defendant C. J. WITTMAN, JR.'s gross negligence and wrongful and wilful negligence and conduct, as aforesaid, Mary A. Connor died in Overlook Hospital on November 24, 1977.

WHEREFORE, Plaintiff demands judgment on this count against the defendant, C. J. WITTMAN, JR., M.D., for compensatory and punitive damages and costs.

SIXTH COUNT

1. Plaintiff repeats the allegations of the First, Second, Third, Fourth and Fifth Counts and makes them Paragraph #1 of this count.

2. The defendant, OVERLOOK HOSPITAL, was and is for a number of years prior to September 13, 1977 a private hospital located in the City of Summit, County of Union, State of New Jersey.

3. During the periods from September 13 - October 5, 1977, October 29 - November 11, 1977 and from November 21 - 24, 1977, decedent Mary A. Connor was a patient at said hospital for the treatment of medical problems hereinbefore set forth in Counts 1, 2, 3, 4 and 5.

Appendix B

4. It was the duty of the defendant, OVERLOOK HOSPITAL, to exercise such reasonable skill and care in the treatment of patients as is usually required of the staffs of private hospitals in similar circumstances and in similar places in the way of treatments preoperatively and postoperatively.

5. Notwithstanding the duty imposed on the defendant, OVERLOOK HOSPITAL, as aforesaid, and the defendant well knowing its duty to decedent Mary A. Connor, it did negligently fail to exercise reasonable skill and care as is usually exercised by the staffs of private hospitals in similar circumstances and in similar places in the following particulars:

a. The defendant, OVERLOOK HOSPITAL, failed to exercise reasonable skill and care in the treatment of decedent Mary A. Connor when she was hospitalized between November 21 - 24, 1977 by failing to perform gastric lavage on decedent and otherwise properly treat her symptoms of gastritis and pancreatitis.

b. The defendant, OVERLOOK HOSPITAL, wilfully attempted to cause an autopsy not to be performed on decedent Mary A. Connor on November 24, 1977.

c. The defendant, OVERLOOK HOSPITAL, was otherwise negligent in failing to properly treat decedent Mary A. Connor postoperatively on November 24, 1977.

6. As a result of the negligent and wrongful acts on the part of the defendant, OVERLOOK HOSPITAL, as aforesaid, Mary A. Connor died in Overlook Hospital on November 24, 1977.

WHEREFORE, Plaintiff demands judgment on this count

Appendix B

against the defendant, OVERLOOK HOSPITAL, for compensatory and punitive damages and costs.

s/ John R. Connor
JOHN R. CONNOR, Beneficiary and Executor-designate of the Estate of Mary A. Connor and for the ADMINISTRATOR of the Estate of Mary A. Connor, for the benefit of Thomas B. Connor, Sr., Thomas B. Connor, Jr., John R. Connor, Robert L. Connor and Carol Moken.

20 November, 1979

PLAINTIFF DEMANDS THAT ALL ISSUES RAISED BY THIS PLEADING BE TRIED BY A JURY.

s/ John R. Connor
JOHN R. CONNOR

20 November, 1979

APPENDIX C—DEFENDANT OVERLOOK'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT RETURNABLE MAY 30, 1980

McDONOUGH, MURRAY & KORN
A Professional Corporation
555 Westfield Avenue
Westfield, New Jersey 07090
(201) 233-9040
Attorneys for defendant Overlook Hospital

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION : UNION COUNTY
DOCKET NO. L-14573-79

CIVIL ACTION
(Medical Malpractice)

JOHN R. CONNOR, Beneficiary and Executor-designate of the Estate of Mary A. Connor and for the ADMINISTRATOR of the Estate of Mary A. Connor, for the benefit of Thomas B. Connor, Sr., Thomas B. Connor, Jr., John R. Connor, Robert L. Connor and Carol Moken,

Plaintiffs,

-vs-

R. G. SACHS, M.D., T. V. INGLESBY, M.D., J. A. BELLADONNA, M.D., N.L. MURRAY, M.D., C. J. WITTMAN, JR., M.D. and OVERLOOK HOSPITAL,

Defendants.

NOTICE OF CROSS MOTION

Appendix C

MOVING PARTY: Overlook Hospital, defendant.

DATE OF MOTION: Friday, May 30, 1980 at 9 a.m.

PLACE: Union County Court House, Elizabeth, New Jersey.

PURPOSE: To dismiss plaintiff's Complaint for lack of standing.

SUPPORTING DOCUMENTS: Moving party will rely upon the annexed Memorandum of Law in support of this Motion.

CERTIFICATION: The original of this Notice of Motion has been filed with the Clerk of the Superior Court of New Jersey and a clear copy has been mailed to the Clerk of Union County, Thomas J. Alworth, Esq., and John R. Connor, *Pro Se*, by certified mail, return receipt requested.

McDONOUGH, MURRAY & KORN, P.A.
Attorneys for defendant Overlook Hospital

BY: s/ Robert J. Logan
Robert J. Logan

DATED: May 15, 1980

Appendix C

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION : UNION COUNTY
DOCKET NO. L-14573-79

CIVIL ACTION
(Medical Malpractice)

JOHN R. CONNOR, Beneficiary and Executor-designate of the Estate of Mary A. Connor and for the ADMINISTRATOR of the Estate of Mary A. Connor, for the benefit of Thomas B. Connor, Sr., Thomas B. Connor, Jr., John R. Connor, Robert L. Connor and Carol Moken,

Plaintiffs,

-vs-

R. G. SACHS, M.D., T. V. INGLESBY, M.D., J. A. BELLADONNA, M.D., N.L. MURRAY, M.D., C. J. WITTMAN, JR., M.D. and OVERLOOK HOSPITAL,

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT OVERLOOK HOSPITAL'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT FOR LACK OF STANDING

McDonough, Murray & Korn, PA
555 Westfield Avenue
Westfield, New Jersey 07090
(201) 233-9040
Attorneys for defendant
Overlook Hospital

Robert J. Logan, Esq.

Appendix C

STATEMENT OF FACTS

This is a medical malpractice action which alleges that the plaintiff's decedent died as a result of the negligence of the defendant Overlook Hospital and the various defendant physicians.

Plaintiff, John R. Connor has designated himself as the beneficiary and Executor-designate of the Estate of the decedent, Mary A. Connor. The caption of the Complaint further indicates that there are certain beneficiaries of the Estate of Mary A. Connor for whose benefit this action has been brought.

Plaintiff is neither the Administrator ad prosequendum nor the Executor of the decedent's Estate. Plaintiff is not an attorney at law admitted to practice in the State of New Jersey.

LEGAL ARGUMENT

By the terms of *N.J.S.A.* 2A:31-2, an action seeking recovery for wrongful death may be brought only by an Administrator ad Prosequendum, and Executor, or an Administrator with a will annexed. No other person is qualified by Statute to pursue such an action. The Statute is quite explicit and provides for no exceptions.

Plaintiff in the instant matter does not fit into any of the statutory categories. Plaintiff therefore lacks the necessary standing to bring the action.

Plaintiff further attempts to bring this action *Pro se*. The *Pro se* appearance of a non-lawyer Administrator or Executor in a wrongful death action is prohibited by *R.* 1:21-1. Sound

philosophy underlying this rule has been set out by the Appellate Division in *Kasharian v. Wilentz,* 93 N.J. Super. 479 (App. Div. 1967). There, the Court observed, "the philosophy of the decided cases is that nominal representatives or even active fiduciaries of the persons in beneficial interest, not themselves lawyers, should not be permitted to conduct legal proceedings in Court involving the rights or liabilities of such persons without representation by attorneys duly qualified to practice law," 93 N.J. Super. at 482.

Plaintiff is not entitled to bring the within action since he is not qualified under the wrongful death statute. In addition, plaintiff is attempting to represent persons other than himself. Since plaintiff is not an attorney admitted to practice in the State, such representation is prohibited.

For both these reasons, plaintiff completely lacks any standing to bring this action. The Complaint was a nullity at the time it was filed, and should be dismissed.

CONCLUSION

For the reasons advanced above, it is respectfully submitted that the Court should dismiss plaintiff's Complaint.

McDONOUGH, MURRAY & KORN, P.A.
Attorneys for defendant
Overlook Hospital

BY: s/ Robert J. Logan
Robert J. Logan

DATED: May 15, 1980

APPENDIX D—ORDER DATED JULY 31, 1980 STAYING PROCEEDINGS IN WRONGFUL DEATH ACTION

McDONOUGH, MURRAY & KORN
555 Westfield Avenue
Westfield, New Jersey 07090
(201) 233-9040
Attorneys for defendant Overlook Hospital

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION : UNION COUNTY
DOCKET NO. L-14573-79

CIVIL ACTION
(Medical Malpractice)

JOHN R. CONNOR, Beneficiary and Executor-designate of the Estate of Mary A. Connor and for the ADMINISTRATOR of the Estate of Mary A. Connor, for the benefit of Thomas B. Connor, Sr., Thomas B. Connor, Jr., John R. Connor, Robert L. Connor and Carol Moken,

Plaintiffs,

-vs-

R. G. SACHS, M.D., T. V. INGLESBY, M.D., J. A. BELLADONNA, M.D., N.L. MURRAY, M.D., C. J. WITTMAN, JR., M.D. and OVERLOOK HOSPITAL,

Defendants.

ORDER

JUDGE: Honorable James H. Coleman, Jr., J.S.C.

Appendix D

DATE OF MOTION: Friday, July 25, 1980.

PARTIES PRESENT OR REPRESENTED: John R. Connor, plaintiff pro se, Paul Nittoly, Esq. of Shanley & Fisher, Esqs., on behalf of the defendant doctors, and Robert J. Logan, Esq., of McDonough, Murray & Korn, Esqs., on behalf of the defendant Overlook Hospital.

ORDERED. All proceedings in the matter of *Connor vs. Sachs, et al.*, Docket No. L-14573-79 are stayed pending the resolution of a Petition for Rehearing presented to the Supreme Court of New Jersey in the matter of the *Estate of Mary A. Connor,* Docket No. 16,613.

FURTHER ORDERED: That John R. Connor shall promptly notify McDonough, Murray & Korn, Esqs., of the Supreme Court's disposition of the Petition for Rehearing.

s/ James H. Coleman, Jr.,
JAMES H. COLEMAN, JR.,
J.S.C.

DATE OF ORDER: July 31, 1980

APPENDIX E—PLAINTIFF'S AMENDED NOTICE OF APPEAL TO THE NEW JERSEY SUPREME COURT APPEALING APPELLATE DIVISION'S DECISION OF MAY 29, 1986

John R. Connor, *Pro se*
380 Wyoming Avenue
Millburn, New Jersey 07041
(201) 762-5587

SUPREME COURT OF NEW JERSEY
DOCKET NO.

Civil Action

In the matter of

JOHN R. CONNOR, Beneficiary and Executor-designate of the Estate of Mary A. Connor and for the ADMINISTRATOR of the Estate of Mary A. Connor, for the benefit of Thomas B. Connor, Sr., Thomas B. Connor, Jr., John R. Connor, Robert L. Connor and Carol Moken,

Plaintiffs,

-vs-

R. G. SACHS, M.D., T. V. INGLESBY, M.D., J. A. BELLADONNA, M.D., N.L. MURRAY, M.D., C. J. WITTMANN, JR., M.D. and OVERLOOK HOSPITAL,

Defendants.

AMENDED NOTICE OF APPEAL ON APPEAL FROM APPELLATE DIVISION TO SUPREME COURT

Appendix E

TO: Robert J. Logan, Esq.
McDonough, Murray & Korn
555 Westfield Avenue
Westfield, New Jersey 07090

Thomas J. Alworth, Esq.
Shanley & Fisher
131 Madison Avenue
Morristown, New Jersey 07960

Information only:

Attorney General of New Jersey
Attn: James J. Ciancia, esq.
Office of the Attorney General
Hughes Justice Complex
Trenton, New Jersey 08625

NOTICE is hereby given that John R. Connor, *Pro se*, Appellant in the matter of *Connor v. Sachs, et al.*, Docket No. A-3491-83T3, hereby appeals to the Supreme Court of New Jersey from the Final Judgment of the Appellate Division of the Superior Court of New Jersey entered in this matter on May 29, 1986.

This appeal questions the validity of *N.J.S.A.* 2A:31-2 and is not entitled to a hearing preference pursuant to *R.* 1:2-5.

s/ John R. Connor
John R. Connor, *Pro se*

Dated: 3 August, 1986

Appendix E

Certificate of Service
and
Payment of Filing Fees

Appellant hereby certifies that he has today served a clear copy of this paper on all parties by mailing same, via first-class mail, to their attorneys as shown on the first page of this Notice; an informational copy has been served on the Attorney General of New Jersey and trial judge Harry V. Osborne, Jr., J.S.C., at the Court House in Elizabeth, New Jersey, by first-class mail. Appellant's original Notice of Appeal in this matter, dated July 23, 1986, was served on the same parties via first-class mail, on July 25, 1986, and on the Attorney General, on the same date, via first-class mail with a Certificate of Mailing.

Appellant further certifies that he has paid the filing fees for this appeal, in accordance with *N.J.S.A.* 22A:2.

s/ John R. Connor
John R. Connor, *Pro se*

Dated: 4th August, 1986

APPENDIX F—DEFENDANT HOSPITAL'S NOTICE OF MOTION AND BRIEF FOR SUMMARY JUDGMENT RETURNABLE SEPTEMBER 12, 1986

McDONOUGH, MURRAY & KORN, P.A.
A Professional Corporation
555 Westfield Avenue
P.O. Box "0"
Westfield, New Jersey 07091
(201) 233-9040
Attorneys for defendant, Overlook Hospital

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION : UNION COUNTY
DOCKET NO. L-14573-79

CIVIL ACTION
(Medical Malpractice)

JOHN R. CONNOR, Beneficiary and Executor-designate of the Estate of Mary A. Connor and for the ADMINISTRATOR of the Estate of Mary A. Connor, for the benefit of Thomas B. Connor, Sr., Thomas B. Connor, Jr., John R. Connor, Robert L. Connor and Carol Moken,

Plaintiffs,

-vs-

R. G. SACHS, M.D., T. V. INGLESBY, M.D., J. A. BELLADONNA, M.D., N.L. MURRAY, M.D., C. J. WITTMAN, JR., M.D. and OVERLOOK HOSPITAL,

Defendants.

Appendix F

NOTICE OF MOTION FOR SUMMARY JUDGMENT ON BEHALF OF DEFENDANT, OVERLOOK HOSPITAL, OR, IN THE ALTERNATIVE, TO DISMISS PLAINTIFFS' COMPLAINT

MOVING PARTY: Defendant, Overlook Hospital.

DATE OF MOTION: Friday, September 12, 1986, at 9:00 a.m.

PLACE: Union County Court House, Elizabeth, New Jersey.

PURPOSE: To apply for an Order granting summary judgment on behalf of the defendant, Overlook Hospital, or, in the alternative, to obtain an Order dismissing plaintiffs' Complaint.

SUPPORTING DOCUMENTS: Brief in support of Motion for Summary Judgment.

CERTIFICATION: The original of this Notice of Motion has been filed with the Clerk of the Superior Court, and a clear copy has been mailed to the Motions Clerk of Union County, Thomas J. Alworth, Esq., and John R. Connor, *Pro Se*, by Certified Mail, return receipt requested.

ORDER: Proposed form of Order is attached.

PRETRIAL CONF. DATE
CALENDAR CALL DATE:
TRIAL DATE: 9/15/86

Appendix F

McDONOUGH, MURRAY &
KORN, P.A.
A Professional Corporation

BY: s/ Susan McCarthy Moryan
Susan McCarthy Moryan

Dated: July 31, 1986

Appendix F

McDONOUGH, MURRAY & KORN, P.A.
A Professional Corporation
555 Westfield Avenue
P.O. Box "0"
Westfield, New Jersey 07091
(201) 233-9040
Attorneys for defendant, Overlook Hospital

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION : UNION COUNTY
DOCKET NO. L-14573-79

CIVIL ACTION
(Medical Malpractice)

JOHN R. CONNOR, Beneficiary and Executor-designate of the Estate of Mary A. Connor and for the ADMINISTRATOR of the Estate of Mary A. Connor, for the benefit of Thomas B. Connor, Sr., Thomas B. Connor, Jr., John R. Connor, Robert L. Connor and Carol Moken,

Plaintiffs,

-vs-

R. G. SACHS, M.D., T. V. INGLESBY, M.D., J. A. BELLADONNA, M.D., N.L. MURRAY, M.D., C. J. WITTMAN, JR., M.D. and OVERLOOK HOSPITAL,

Defendants.

CERTIFICATION

James Caldas, by way of certification in lieu of affidavit, says:

Appendix F

1. I am the Executive Vice President and Chief Operating Officer of defendant, Overlook Hospital, in the above matter.

2. This action is a wrongful death action brough against Dr. R.G. Sachs, Dr. T.V. Inglesby, Dr. J.A. Belladonna, Dr. N.L. Murray, Dr. C.J. Wittman, Jr. and Overlook Hospital stemming from the death of Mary Connor at Overlook Hospital in November 1977.

3. The doctors mentioned in Paragraph 2 are not employees of Overlook Hospital. They are merely members of the hospital staff at Overlook Hospital with privileges to practice at this hospital.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

James Caldas

Dated:

Appendix F

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION : UNION COUNTY
DOCKET NO. L-14573-79
CIVIL ACTION
(Medical Malpractice)

JOHN R. CONNOR, Beneficiary and Executor-designate of the Estate of Mary A. Connor and for the ADMINISTRATOR of the Estate of Mary A. Connor, for the benefit of Thomas B. Connor, Sr., Thomas B. Connor, Jr., John R. Connor, Robert L. Connor and Carol Moken,

Plaintiffs,

-vs-

R. G. SACHS, M.D., T. V. INGLESBY, M.D., J. A. BELLADONNA, M.D., N.L. MURRAY, M.D., C. J. WITTMAN, JR., M.D. and OVERLOOK HOSPITAL,

Defendants.

BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON BEHALF OF DEFENDANT, OVERLOOK HOSPITAL

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STATEMENT OF FACTS

This is a wrongful death action with a long history both in the trial and appellate courts. Plaintiff, acting *pro se*, filed a wrongful death Complaint on November 21, 1979. This Complaint alleges negligence on the part of the various individually named defendants and Overlook Hospital resulting in the death of plaintiff's mother on November 24, 1977. (See Exhibit "A".) The individual physician defendants were not employees of Overlook Hospital. (See Exhibit "B".) A series of motions, orders and appeals as to who was the proper party plaintiff to bring the wrongful death action thereafter followed since plaintiff, though named as the Executor of his mother's will, failed to qualify as Executor. Ultimately, on February 10, 1984, the trial court entered an Order dismissing plaintiff's Complaint since he was neither the Executor, Administrator *ad prosequendum* or Executor c.t.a. of his mother's estate and, therefore, had no standing to file the wrongful death action.

Plaintiff appealed from the trial court Order dismissing his Complaint and the Appellate Division rendered its decision on this appeal on May 29, 1986. (See Exhibit "C".) The Appellate Division reversed the dismissal of plaintiff's Complaint and remanded the matter to provide plaintiff an opportunity, within 30 days of the date of remand, to request Lucas Phillips, Esq. to substitute as party plaintiff and, if Phillips refuses, within 30 days thereafter, to join Phillips as a party defendant to compel his substitution or to appoint the present plaintiff as Administrator *ad prosequendum*. More than 60 days have expired since the Appellate Division's remand and none of the required action has been taken. Trial is now scheduled for September 15, 1986.

Furthermore, although plaintiff makes several allegations of

negligence against Overlook Hospital, he has never supplied any expert reports alleging deviations from accepted practice on the part of Overlook Hospital. For this reason, it is respectfully submitted that Overlook Hospital is entitled to summary judgment at this time. It is also submitted that plaintiff's failure to comply with the recent decision of the Appellate Division requires dismissal of his Complaint.

LEGAL ARGUMENT

Since plaintiff has submitted no expert report alleging deviations from expected standards of practice on the part of Overlook Hospital, Overlook Hospital is entitled to summary judgment in its favor.

It is well settled that in most instances, the plaintiff is required to produce expert testimony to establish a standard of medical practice and show defendant's deviation from that standard. *Parker v. Goldstein,* 78 N.J. Super. 472 (App. Div.), *certif. den.,* 40 N.J. 255 (1963). First, evidence must be presented to establish the applicable standard of medical practice in the particular case and second, it must be evidenced that the doctor or hospital negligently departed from this recognized standard of care in the treatment of the patient.

The holding in *Parker* is consistent with earlier case law in New Jersey. In *Carbone v. Warbuton,* 11 N.J. 418 (1953) and *Clark v. Witchman,* 72 N.J. Super. 486 (App. Div. 1962), the courts held that the legal duty "must be measured by some medical standard of care and treatment, and what that is and whether a defendant negligently departed from it to the plaintiff's injury, can competently be testified to only by one qualified to know of it." 11 N.J. at 428; 72 N.J. Super. at 497.

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In order to establish any liability on the part of the defendant, it is incumbent upon the plaintiff to provide the jury with such expert testimony as will establish by a preponderance of the credible evidence that there was a deviation from the applicable standard of care. In *Sanzari v. Rosenfeld,* 34 N.J. 128 (1961), the Supreme Court followed the same reasoning:

> In the ordinary. . .medical malpractice case. . .the jury is not competent to supply the standards by which to measure the defendant's conduct. Since it has not the technical training necessary to determine the applicable standard of care, it cannot, without more, form a valid judgment as to whether the defendant's conduct is unreasonable under the circumstances. Therefore, ordinarily when a physician. . .is charged with negligence in the treatment of a patient, the standard of practice to which he failed to adhere must be established by expert testimony. In such cases if the plaintiff does not advance expert testimony establishing an accepted standard of care, it is proper for the court to grant a dismissal at the close of plaintiff's case.

34 N.J. at 135.

Accordingly, in all cases, with the exception of those falling under the "common knowledge doctrine" which is not applicable here, expert medical testimony is critical to plaintiff's burden in establishing the defendant's liability. Thus, it is respectfully submitted that because plaintiff has failed to furnish any expert report which criticizes the care and treatment rendered by Overlook Hospital, the hospital is entitled to judgment in its favor as a matter of law. *Judson v. Peoples Bank and Trust Co. of Westfield,* 17 N.J. 67 (1954).

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Furthermore, it must also be mentioned that plaintiff has failed to take the curative action with respect to the proper party plaintiff in this case within the time limits set by the Appellate Division. For this reason, it is also submitted that dismissal of the Complaint is warranted pursuant to *Rule* 4:37-2(a).

CONCLUSION

Based upon the foregoing, it is respectfully requested that defendant Overlook Hospital is entitled to summary judgment based upon the lack of expert testimony or, in the alternative, for dismissal of plaintiff's Complaint based upon his failure to comply with the decision of the Appellate Division.

Respectfully submitted,

McDONOUGH, MURRAY & KORN, P.A.
A Professional Corporation

By: s/ Susan McCarthy Moryan
Susan McCarthy Moryan

Dated: July 31, 1986

APPENDIX G—ORDER OF NEW JERSEY APPELLATE DIVISION OF MARCH 5, 1987 DENYING PLAINTIFF'S APPEAL OF GRANT OF SUMMARY JUDGMENT AS INTERLOCUTORY

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A-1573-86T6
MOTION NO. M-2653-86
BEFORE PART: G
JUDGE(S): FURMAN, SHEBELL, STERN

JOHN R. CONNER etc.

vs.

R. G. SACHS, M.D., T.V. INGLESBY, M.D., J.A. BELLADONA, M.D. et al

MOTION FILED: FEBRUARY 5, 1987

ANSWER(S) FILED: MARCH 2, 1987 BY: JOHN CONNOR

SUBMITTED TO COURT: MARCH 4, 1987

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS ON THIS 5 DAY OF MARCH, 1987, HEREBY ORDERED AS FOLLOWS:

MOTION BY RESPONDENT OVERLOOK HOSPITAL TO DISMISS THE APPEAL

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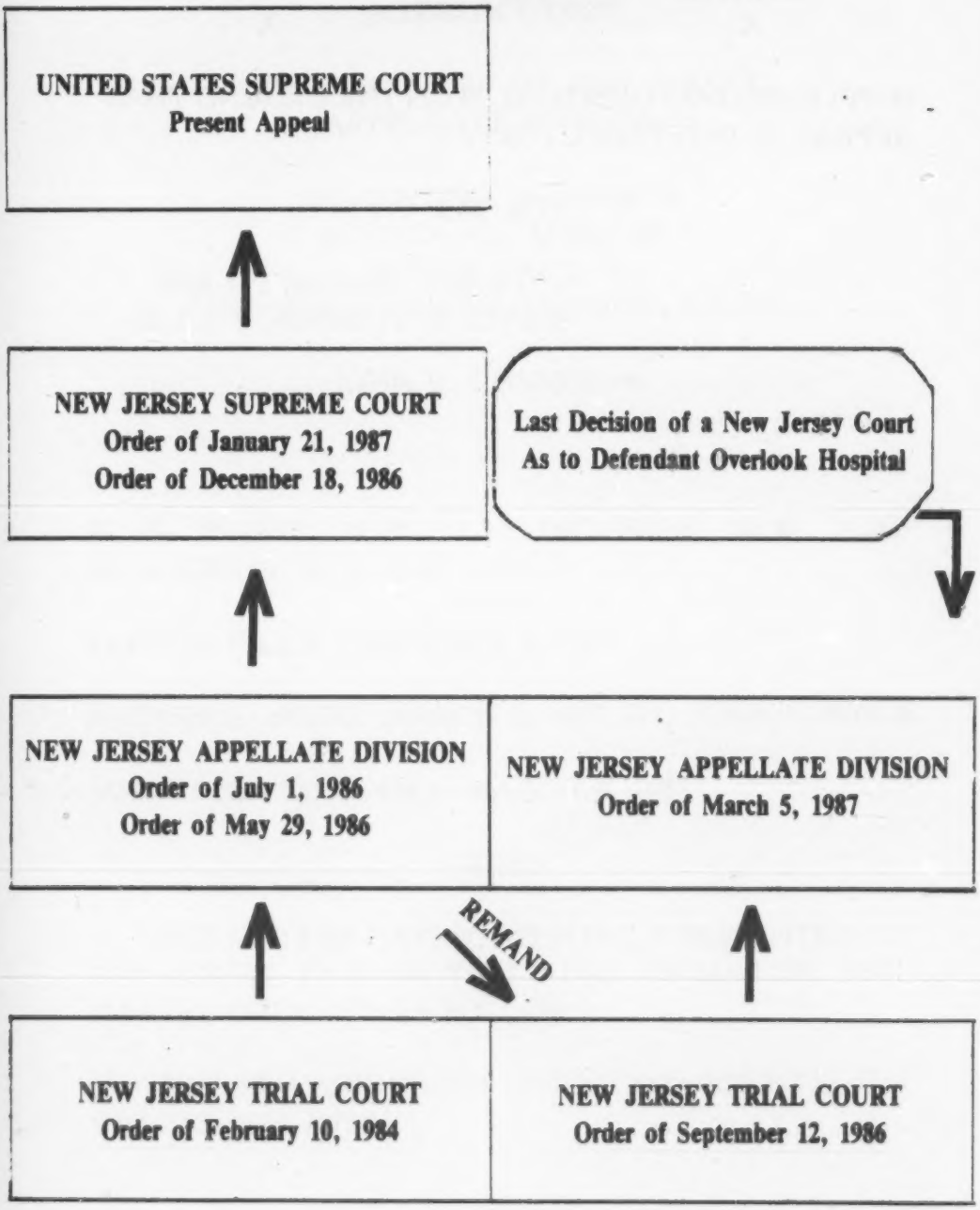
GRANTED	DENIED	OTHER
X		X

SUPPLEMENTAL: DISMISSAL IS ON THE GROUND THAT APPEAL IS INTERLOCUTORY.

FOR THE COURT:

s/ David D. Furman, P.J.A.D.
DAVID D. FURMAN, P.J.A.D.

APPENDIX H—GRAPHIC REPRESENTATION OF THE PROCEDURAL HISTORY OF THE CASE


UNITED STATES SUPREME COURT
Present Appeal
NEW JERSEY SUPREME COURT
Order of January 21, 1987
Order of December 18, 1986
Last Decision of a New Jersey Court
As to Defendant Overlook Hospital
NEW JERSEY APPELLATE DIVISION
Order of July 1, 1986
Order of May 29, 1986
NEW JERSEY APPELLATE DIVISION
Order of March 5, 1987
REMAND
NEW JERSEY TRIAL COURT
Order of February 10, 1984
NEW JERSEY TRIAL COURT
Order of September 12, 1986